No. 94-1779

Supreme Court, U.S.
FILED
JUN 6 - 1995
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1994

MICHAEL Q. JONES, INC.
Petitioner,

v.

COUNTY OF TUOLUMNE and
ALL PERSONS INTERESTED IN THE
MATTER OF VALIDITY OF THE COUNTY
SERVICES IMPACT FEE,
Respondents.

**Petition for Writ
of Certiorari
to the Court of Appeal,
State of California,
Fifth Appellate District**

PETITIONER'S REPLY BRIEF

JAMES S. BURLING
*R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Petitioner

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

I. BOILERPLATE ASSERTIONS OF COMPLIANCE WITH CALIFORNIA GOVERNMENT CODE §§ 66000-66007 CANNOT SUBSTITUTE FOR ACTUAL COMPLIANCE WITH THIS COURT'S REQUIREMENT OF AN ESSENTIAL NEXUS UNDER NOLLAN 2

II. RESPONDENT'S CLAIM THAT THIS IS AN INSIGNIFICANT CASE THAT WILL NOT CONTRIBUTE TO THE GROWING CONFLICT BETWEEN THE STATES IS CONTRADICTED BY THE PUBLIC STATEMENTS OF RESPONDENT'S COUNSEL 4

CONCLUSION 6

TABLE OF AUTHORITIES CITED

Page

Cases

Dolan v. City of Tigard, 505 U.S. ___, 129 L. Ed. 2d 304 (1994) 2,4-5

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479, 618 N.Y.S.2d 8576 (1994) 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2-5

Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989) 4

Statute

California Government Code §§ 66000-66007 2-4

Rule

Supreme Court Rule 15.6 1

No. 94-1779

In the

Supreme Court of the United States

October Term, 1994

MICHAEL Q. JONES, INC.
Petitioner,

v.

COUNTY OF TUOLUMNE and
ALL PERSONS INTERESTED IN THE
MATTER OF VALIDITY OF THE COUNTY
SERVICES IMPACT FEE,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal, State of California, Fifth Appellate District

PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, petitioner Michael Q. Jones, Inc. (Jones), respectfully submits this Reply to the Respondent's Brief in Opposition (Opposition) served by respondent County of Tuolumne (County) on May 19, 1995.

In its Opposition the County argues for the first time that the fee at issue in this litigation in fact complies with the "substantial nexus" requirement of *Nollan v. California Coastal Commission* because such compliance is required by California Government Code (GC) §§ 66000-66007. This argument illustrates the extent to which California land use agencies have elevated form over substance, adopting boilerplate statements of compliance with GC §§ 66000-66007 ***as a substitute*** for actually complying with this Court's *Nollan* mandate.

The County also asserts that, as an unpublished decision, this case has no independent significance and will not contribute to the growing conflict between the states on questions of federal constitutional rights under the Takings Clause. This argument conflicts with public statements by respondent's counsel portraying the decision below as a landmark and urging the adoption of similar development fees--which would be struck down in other states as violative of *Nollan* and *Dolan*--throughout the State of California.

I

BOILERPLATE ASSERTIONS OF COMPLIANCE WITH CALIFORNIA GOVERNMENT CODE §§ 66000-66007 CANNOT SUBSTITUTE FOR ACTUAL COMPLIANCE WITH THIS COURT'S REQUIREMENT OF AN ESSENTIAL NEXUS UNDER NOLLAN

This case involves a constitutional challenge to a County development fee based on a simple 30-year extrapolation of a single year's revenue shortfall in selected general fund accounts. Petition for Writ of Certiorari (Petition) at 3-4. The California Court of Appeal upheld the fee against Jones' claim that the exaction effected a regulatory taking under this Court's holdings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and

Dolan v. City of Tigard, 505 U.S. ___, 129 L. Ed. 2d 304 (1994).

In its Opposition, the County does not dispute the fact that the fee in question was wholly determined by a study of a single year's operating deficit incurred by the County two years before Jones applied for the building permit that subjected him to the fee. Petition at 6. Likewise, the County does not allege that any individualized findings have ever shown a connection between the amount of the fee and the actual impact of Jones' use of his property. Petition at 15. Nevertheless, the County asserts that the fee must meet *Nollan's* requirement of a close, essential nexus to Jones' proposed project *because such a nexus is required by California law!* Opposition at 9-10.

In raising this argument, the County has unwittingly demonstrated the "gamesmanship" by which California land-use agencies routinely evade the constitutional requirements of this Court. It is true, as the County alleges, that California Government Code §§ 66000-66007 paraphrases *Nollan's* nexus requirements. However, the effect of this legislation has simply been to allow irresponsible California governments to adopt boilerplate statements of compliance with the Government Code *as an alternative* to actually complying with *Nollan*. As a case in point, the County's own assertion that it has complied with GC §§ 66000-66007 (set forth in County Resolution No. 381-90, Petition at F2-F3) is nothing more than a rubber stamp; the record shows that the County adopted these "findings" without conducting any inquiry whatsoever into whether such a nexus actually existed.

This is exactly the sort of evasion this Court foresaw when it warned that it viewed "the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Nollan*, 483 U.S.

at 841. GC §§ 66000-66007 is neither clever nor especially imaginative; boilerplate assertions of compliance with this statutory scheme cannot serve as a proxy for actually meeting the strict constitutional standards this Court has set forth in *Nollan* and *Dolan*.

II

RESPONDENT'S CLAIM THAT THIS IS AN INSIGNIFICANT CASE THAT WILL NOT CONTRIBUTE TO THE GROWING CONFLICT BETWEEN THE STATES IS CONTRADICTED BY THE PUBLIC STATEMENTS OF RESPONDENT'S COUNSEL

As fully set forth in Jones' Petition, the decision below is the latest in a trend of California decisions conflicting with the federal constitutional jurisprudence of this Court and with that of the highest state courts of New York. Petition at 9-23. In its Opposition, the County argues for the first time that, because the decision below was unpublished, it does not contribute to this growing conflict.[1] Opposition at 2. This argument is wholly disingenuous, as

---

[1] The County also claims that the decision below does not conflict with the recent opinions of the New York Court of Appeals because the New York cases, *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 618 N.Y.S.2d 8576 (1994), do not deal with monetary development exactions. Opposition at 10. This argument proves too much. While the California courts are still concocting excuses to restrict this Court's *Nollan* and *Dolan* rulings to a limited class of physical exactions, the New York courts have extended those rulings far beyond exactions of any kind, applying the essential nexus and rough proportionality tests to the general realm of property regulations.

demonstrated by the fact that counsel for the County has recently cited this case as establishing that similar unconstitutional fees can survive legal challenge, and promoting their adoption throughout the State of California.

In comments presented to the League of California Cities City Attorneys Conference on May 4, 1995, (Comments lodged concurrently with this Reply) opposing counsel in this case documents the conflict among state courts on the federal constitutional questions at issue in this litigation. Comments at 10. These comments also cite the present case as establishing the current position of the California courts on the applicability of *Nollan* and *Dolan* to development fees (Comments at 11), encouraging the adoption of similar schemes throughout the State of California. Comments at 18-19.

Clearly, Tuolumne County is well aware that the decision below comprises an important extension of a line of California cases conflicting with the opinions of this Court and the high courts of other states on important issues of federal constitutional rights. The County's representations to the contrary in its Respondent's Brief in Opposition are patently disingenuous and should be ignored by this Court.

CONCLUSION

For the reasons set forth above, petitioner Michael Q. Jones, Inc., again urges this Court to grant the petition for Writ of Certiorari.

DATED: June, 1995.

Respectfully submitted,

JAMES S. BURLING
* R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Petitioner